

### **REMARKS**

These amendments and remarks are being filed in response to the Office Action mailed June 20, 2007 (the "Office Action"). At the time of the Office Action, claims 12-23 were pending, with 15 and 20-22 withdrawn from consideration. The Office Action rejected all of the claims under 35 U.S.C. §102(b), 35 U.S.C. §112, second paragraph, and/or non-statutory double patenting grounds. The rejections and response thereto are set forth fully below.

By this Amendment, claims 12 and 13 are amended. No new matter is added.

#### **Claim Amendments**

Claims 12 has been amended to recite an "electret material" rather than an electric carrier, and to specify that the auxiliaries and active agents are "cosmetic auxiliaries" and "cosmetic active ingredients." The "cosmetic" amendment merely clarifies that the cosmetic descriptor refers to the auxiliaries and active ingredients, not just carrier substances. Support for these amendments can be found throughout the specification, including paragraphs [0006] - [0014].

Claim 13 is amended to clarify a typo noted by the Examiner.

No new matter is added.

#### **Claim Rejections for Provisional Obviousness-Type double Patenting**

In the Office Action, a provisional obviousness-type double patenting rejection was imposed against claims 12, 13 (in part), 14, 16-19 and 23 based on the combination of U.S. Application 10/474,093 in view of Konikoff. Provisional obviousness-type double patenting rejections were also imposed against these same claims based on combinations of U.S. Applications 10/574,069, 11/757,089 and 11/757,128 in view of Konikoff.

In order to expedite prosecution of this case to allowance, Applicants are submitting terminal disclaimers for co-pending applications 10/474,093 and 10/574,069, along with the requisite statutory disclaimer fee.

After reviewing the PAIR file wrappers of applications 11/757,089 and 11/757,128, it appears that these are not pending applications. Rather, it appears that these serial numbers were accidentally created when a paralegal who was learning to use the PTO's electronic filing system attempted to file a response to an office action. Accordingly, Applicants respectfully request that

the provisional obviousness-type double patenting rejection be withdrawn with respect to applications 11/757,089 and 11/757,128.

Claim Rejections Under 35 U.S.C. § 112, second paragraph

Claims 12-14, 16-19 and 23 were rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The Office Action is apparently seeking clarification of the phrase "electric carrier." Claim 12 has been amended to recite an "an electret material," rather than an electric carrier. Applicants believe this clarifies the scope of the claimed subject matter.

The terms "auxiliaries" and "active agents" are also rejected under 35 U.S.C. § 112, second paragraph. Claim 12 has been amended to recite "cosmetic carrier substances, cosmetic auxiliaries, further cosmetic active ingredients or a mixture thereof." Applicants respectfully submit that a person of skill in the art would understand that "cosmetic active agents" is meant to include those agents that are intended to provide some cosmetic benefit when applied to the skin as part of a cosmetic composition, whereas "cosmetic auxiliaries" are agents that are included in a cosmetic composition that are not intended to provide a cosmetic benefit. Accordingly, Applicants respectfully request that the rejections under 35 U.S.C. § 112, second paragraph, be withdrawn.

Rejection Under 35 U.S.C. § 103

Claims 12, 13 (in part), 14, 16-19 and 23 were rejected under 35 U.S.C. § 103, as being unpatentable over U.S. Patent No. 5,122,418 issued to Nakane *et al.* (hereinafter "Nakane") in view of U.S. Patent No. 4,142,521 issued to Konikoff (hereinafter "Konikoff").

Before addressing the cited references, Applicants wish to review the claimed invention. The claimed invention is drawn to a cosmetic composition that exhibits improved absorption of active agents into skin cells, when compared to cosmetic compositions that do not include the claimed electret materials, *see* Specification, paragraph [0005] & [0015]. For example, Applicants have demonstrated that the claimed electret containing compositions provide substantially improved absorption of active ingredients including, but not limited to, Vitamin A, Vitamin E, Creatine and Vitamin B, *see* Specification, paragraphs [0017]-[0020]. This improved

absorption of cosmetically active ingredients was a surprising result to the Applicants and was not disclosed or suggested by any of the cited references, whether alone or in combination.

Turning now to the Nakane reference. Nakane is drawn to a *composite powder* formed from a spherical core powder covered with a coating powder having an average particle size diameter that is one-fifth or less of the average particle size diameter of the spherical core powder, *see* Nakane, Abstract. The composite powder in Nakane can be used as part of a skin treatment agent, as a sunburn preventing cosmetic and as a deodorant, *see id.*

Nakane was developed in order to capitalize on the benefits of the two powders while minimizing their drawbacks by combining them to form a composite powder, *see* Nakane, col. 4, ln. 64 - col. 5, ln. 9; col. 12, ln. 57 - col. 13, ln. 33. Nakane explains that many powders, for example hydroxyapatite, provide a significant benefit for skin care, but do not spread evenly over the skin, *see* Nakane, col. 2, ln. 5-22. The powders that provide a significant skin benefit are not generally spherical. In contrast, spherical powders exhibit improved skin smoothness but are generally poor at hiding wrinkles when applied to the skin, *see* Nakane, col. 2, ln. 23-59.

Nakane attempts to leverage the advantages of both types of powders by forming a composite powders with a spherical core powder as a base that is covered with a significantly smaller diameter coating powder (such as hydroxyapatite), *see* Nakane, col. 4, ln. 64 - col. 5, ln. 9. The result is a generally spherical composite powder that exhibits the cosmetic properties of the coating powder, but spreads evenly like the spherical powders. Nakane discloses that the composite powder feels smooth and provides improved hiding power, *see* Nakane, col. 12, ln. 57 - col. 13, ln. 12.

As noted in the Office Action, Nakane discloses that TEFLON, polytetrafluoroethylene (PTFE), may be used as the core powder, *see* Nakane, col. 10, ln. 23-30; col. 28, ln. 13-14. Nakane does not discuss any benefits of using TEFLON. However, Nakane clearly discloses that TEFLON is used as the core material, *i.e.* it is spherical. Thus, one of skill in the art would understand that TEFLON was selected because it is readily formed into the spherical form necessary for the core of Nakane's composite powders. As noted in the Office Action, Nakane does not disclose or suggest using TEFLON as an electret material.

Turning now to the Konikoff reference. Konikoff is drawn to a wound repair enhancement device in the form of a "self-contained, non-invasively applied bandage" that is light-weight and wafer-thin, *see* Konikoff, Abstract; col. 3, ln. 25-35. The wound repair

enhancement device includes a thin film or foil of an electret material, which promotes healing of the skin, *see* Konikoff, Figures 1-3; col. 5, ln. 37-40 & 67-68; col. 6, ln. 4-5 & 14-17; col. 7, ln. 7-9 and 61-63.

Konikoff clearly deals with enhanced healing of wounds, such as those caused by surgery, *see* Konikoff, col. 4, ln. 32-47. Equally clearly, Konikoff discloses the use of electret films that are self-contained within a bandage-like device. Konikoff indicates that the bandages must be "self-contained" because loose material in surgical wounds, or other severe wounds, can hinder the healing process, cause infection, or both. Thus, Konikoff teaches away from the use of small particles, such as those of the claimed invention, that could escape from the bandage device and hinder, rather than help, the healing process.

As noted above, Nakane's reason for using PTFE is based nearly exclusively on the morphology of small PTFE particles. Because shape is the relevant property, there is nothing in Nakane or elsewhere to motivate one skilled in the art to use an electret PTFE core in the composite powders disclosed therein. Similarly, Because Konikoff deals with wound healing, there is nothing in Konikoff's disclosure to motivate one skilled in the art to combine electret materials with active ingredients to provide *improved absorption of active ingredients*. Clearly, there is no motivation to combine the cited references to produce the claimed invention. Accordingly, Applicants respectfully request withdrawal of the current obviousness rejection.

In the same vein, modifying Konikoff to include powdered electret materials would potentially hinder the healing process, cause infection or both. This would render Konikoff inoperable for its intended purpose, *see* MPEP 2145.III. Conversely, adding electret films to Nakane would render it inoperable for its intended purpose. Clearly, there is no motivation to combine the cited references to produce the claimed invention. Accordingly, Applicants respectfully request withdrawal of the current obviousness rejection.

It should also be clear that Konikoff deals with wound care devices, which are in a completely different field from the claimed cosmetic compositions, which are intended to provide a youthful appearance by improving absorption of active ingredients. The claimed cosmetic compositions are applied as part of a daily skin care routine, and would not be applied to open wounds as directed by Konikoff. Accordingly, Applicants respectfully assert that Konikoff is from a nonanalogous art and is not applicable to an obviousness rejection of the claimed cosmetic composition.

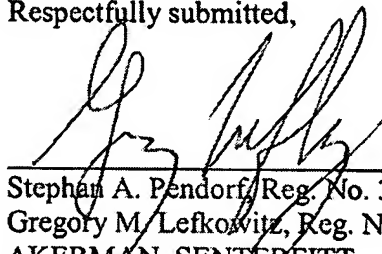
Even if there were motivation to combine the cited references, there would be no expectation that the claimed combination would produce enhanced absorption of active ingredients. Although Konikoff discloses that it is known that small electric currents improve wound repair, it states that the reason for this "remains unclear," *see* Konikoff, col. 1, ln. 21-24. Because the mechanism that causes small electronic currents to improve wound healing is unknown, a person of skill in the art would not be able to predict whether small electronic currents would impact absorption of active ingredients or, for that matter, anything other than skin healing.

The improved absorption of the cosmetically active ingredients attributable to the presence of the electret material was completely unexpected and surprising to the inventors of the claimed invention. As noted above, there was nothing in the cited references that disclosed or suggested this interaction. This secondary indicia provides substantial evidence of nonobviousness.

#### Conclusion

For at least the reasons set forth above, the independent claims are believed to be allowable. In addition, the dependent claims are believed to be allowable due to their dependence on an allowable base claim and for further features recited therein. The application is believed to be in condition for immediate allowance. If any issues remain outstanding, Applicant invites the Examiner to call the undersigned if it is believed that a telephone interview would expedite the prosecution of the application to an allowance.

Respectfully submitted,



Stephan A. Pendorf, Reg. No. 32,665  
Gregory M. Lefkowitz, Reg. No. 56,216  
AKERMAN SENTERFITT  
222 Lakeview Avenue, Suite 400  
West Palm Beach, Florida 33401-6183  
Telephone: 561.653.5000

Date: September 20, 2007

Attorney Docket No.: 4034.003